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No. 00-1403

IN THE

Supreme Court of the United States

BETTY JEAN GURLEY,

Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In his brief in opposition, Respondent does not contest that the question whether fraudulently transferred assets are property of the bankruptcy estate at its inception is important and recurring and further he acknowledges that the courts of appeals are in conflict on this issue. Opposition ("Opp.") at 9, 5. But Respondent contends that this case is not a good vehicle for the resolution of the question on several grounds. In this reply, we show that Respondent's arguments are entirely without merit, and that certiorari should be granted in this case.

1. Respondent's first argument is that the Court should not consider the legal question presented because the Petition rests on "'facts' that are derived from Mr. Gurley's testimony

which were specifically rejected by the Bankruptcy Court." Opp. at 1, 2. This is simply and clearly untrue.

For purposes of the petition for certiorari, Betty Gurley accepted the lower courts' factual findings that her husband had transferred the assets in question to her so that they would not be included in his estate and that he continued to exercise dominion and control over the assets. For example, in the Statement of the Case, Betty Gurley expressly acknowledged that the Bankruptcy Court rejected William Gurley's testimony that he transferred the assets in question for estate planning purposes and found instead that he sought to avoid a forthcoming civil judgment. See Petition at 3 ("[t]he court, however, found that William Gurley somehow knew 18 months in advance that Betty Gurley would be dismissed from the CERCLA action and that two years hence judgment would be entered against him such that he retained complete control of the property transferred after the transfers occurred and received no consideration. Accordingly, the court concluded that his intent in making the transfers was to hinder, delay and defraud the United States") (citation omitted; internal quotations omitted).[1] The Petition further accepted the lower courts' legal conclusion that Respondent was entitled to avoid any fraudulent transfers made on or after April 25, 1990 – *i.e.*, within the six-year limitations period for the filing of claims of fraudulent transfer. Petitioner's sole contention to this Court is the purely legal one that neither a State nor a court may define a debtor's interest in fraudulently transferred property as an equitable ownership interest and thereby entirely eliminate any statute of limitations on claims of fraudulent transfer for purposes of federal bankruptcy law. Put differently, federal law defines what is property of the bankruptcy estate; federal law excludes fraudulently

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[1] In addition, the Petition expressly recognized that, despite Betty Gurley's vehement opposition and evidence to the contrary, the lower courts found against her with respect to her claims of real and personal property rights. Petition at 3 n.1.

transferred property from the estate at its inception and sets limitations periods for claims seeking to include it; and state law may not circumvent these federal laws simply by defining the debtor's interest in fraudulently transferred property as an equitable interest.[2]

It is, accordingly, Respondent who is missing the point with his oft-repeated statement that Betty Gurley is ignoring the lower courts' conclusion that no effective transfer occurred. This is not a factual finding, but a legal conclusion. The lower courts attached the legal label of "equitable ownership" to the set of facts found by the Bankruptcy Court; by contrast, Betty Gurley asserts that the proper label for this set of facts under federal law is "fraudulent transfer." The lower courts' ruling contravenes federal law by including fraudulently transferred property in the estate at its inception and, more importantly, by eliminating any statute of limitations on fraudulent transfers. See, *e.g.*, *FDIC* v. *Hirsch* (*In re Colonial Realty Corp.*), 980 F.2d 125, 131 (2d Cir. 1992); Petition at 12-13 (citing cases). We are not ignoring the legal conclusion that no effective transfer occurred, but instead are challenging the legal label placed on the events in question and its undeniable ill effects.

2. Respondent's next argument is that, although there is a conflict on the question whether fraudulently transferred property is property of the estate before the trustee recovers it, this Court should not grant the petition and decide the issue because Betty Gurley failed to raise this question below. Opp. at 5. That argument is demonstrably wrong.

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[2] Respondent insinuates that this Court should not grant certiorari because the lower courts found Mr. Gurley not to be credible – *i.e.*, that an erroneous legal ruling should not be the subject of certiorari review because the petitioner's husband does not deserve the Court's attention. This is no part of the test for this Court's review; moreover, Betty Gurley, not her husband, is the petitioner here.

In her opening brief to the court of appeals, Betty Gurley specifically argued that "[t]he courts below erred in concluding that § 541(a)(1) [which defines the property of the estate at its inception to include equitable interests in property] contains a grant of authority to set aside transfers. This reading renders § 541(a)(3) superfluous. Section 541(a)(3) provides that property recovered by the Trustee under his avoidance powers is property of the estate. If § 541(a)(1) was meant to include a self-executing avoidance power to set aside transfers of property, the Congress would never have included subsection (a)(3)." Brief of the Appellant at 28, *Mills* v. *Gurley* (*In re Gurley*), No. 99-13416-J (11th Cir. Sept. 20, 2000); see also *id.* at 16-17. Even more to the point, Betty Gurley argued that "[t]he Trustee's denomination of his remedy as the nominee theory, alter ego theory, or constructive trust theory does not obviate the fact that *each of these is merely an equitable remedy for the recovery of wrongfully transferred property*." *Id.* at 32-33 (emphasis supplied). Indeed, the heading of the primary argument in Betty Gurley's Reply Brief in the court of appeals stated: "The courts below erred in setting aside transfers under 11 U.S.C. § 541 in as much as they crafted a novel equitable remedy to circumvent the extinguishment of the trustee's cause of action." Reply Brief of Appellant at 12, *Mills* v. *Gurley* (*In re Gurley*), No. 99-13415-J (11th Cir. Sept. 20, 2000) (capitalization omitted). Betty Gurley most certainly argued in the lower courts that the federal limitations period for fraudulent transfers may not be avoided by defining a debtor's interest in fraudulently transferred property as an "equitable interest[]" in property under section 541(a)(1) of the Bankruptcy Code, 11 U.S.C. § 541(a)(1).

3. Respondent's brief in opposition recites the "facts of record" that led the courts below to the conclusion that the debtor retained an "equitable interest[]" in the property transferred to his wife. Based on these facts, Respondent argues, the courts found that "no transfer had occurred."

Opp. at 6. But the facts of record plainly show that a fraudulent transfer has occurred under well established law. Indeed, prepetition transfers to family members of title to an asset for inadequate consideration are routinely treated as fraudulent transfers, especially where, as here, the debtor retains possession or control of the asset. See Petition at 13 & n.7 (citing and describing cases); *id.* at 11 n.6 (describing Florida law of fraudulent transfer). Yet the court of appeals found that under Florida law, the debtor had retained equitable ownership of the property transferred, and therefore concluded that under *federal* law, the property remained in the estate from its inception and that no federal limitations period applied. But the state law label of equitable ownership, like the labels of nominee, constructive trust, alter ego, are nothing more than equitable devices or remedies for dealing with the fraudulent transfer of property, see, *e.g.*, *XL Datacomp* v. *Wilson* (*In re Omegas Group, Inc.*), 16 F.3d 1443, 1451 (6th Cir. 1994) ("a creditor's claim of entitlement to a constructive trust is not an 'equitable interest' in the debtor's estate existing prepetition"); and such labels do not alter the fact that under federal law, a fraudulent transfer has occurred and a federal limitations period applies.

Respondent's citation of three federal cases holding that federal taxing authorities can seize assets from a taxpayer's nominee are entirely inapposite here. In all three cases – *LiButti* v. *United States*, 107 F.3d 110 (2d Cir. 1997); *Towe Antique Ford Foundation* v. *IRS*, 999 F.2d 1387 (9th Cir. 1993); *United States* v. *Charnock* (*In re Charnock*), 97 B.R. 619 (Bankr. M.D. Fla. 1989) – the courts held that a taxpayer and a business entity were alter egos or, put differently, that the business entity was the taxpayer's nominee, and therefore that the federal taxing authority was entitled to engage in reverse piecing of the corporate veil so that the assets of a corporate entity could be used to satisfy the debts of the individual taxpayer. None of these cases addressed the question whether a fraudulent transfer had occurred for

purposes of federal bankruptcy law and none involved the application of a statute of limitations for such a claim. These cases simply do not assist the inquiry into the question presented here – whether a state law label may circumvent the federal bankruptcy law's provisions excluding fraudulently transferred property from the bankruptcy estate at its inception and establishing limitations periods for claims for the return of such property.

4. Finally, Respondent contends that the real question presented by this case is "whether [Betty Gurley's] husband could use her as a pawn to protect his assets from bankruptcy while he retained complete, unfettered control over those same assets." Opp. at 8. This is an appeal to emotion that is worse than misleading, for it is untrue. The law is absolutely clear that if a debtor fraudulently transfers assets to protect them from bankruptcy while retaining possession and use, the trustee in bankruptcy may recover those assets for the bankruptcy estate at any time during a generous period of six years under the Federal Debt Collection Procedures Act. There is no question that a debtor seeking to avoid payment of debts by transferring assets is prohibited from doing so by the Bankruptcy Code. But it is equally clear that here, as the Bankruptcy Court found, "[t]he United States failed to exercise reasonable due diligence in discovering the transfers to Mrs. Gurley," Pet. App. 21a, and that the limitations period ran. Thus, the question presented is whether a state may define a debtor's "equitable interest[]" in property to include property fraudulently transferred such that the property is part of the bankruptcy estate "as of the commencement of the case" under federal bankruptcy law, 11 U.S.C. § 541(a)(1), and thereby avoid the application of any federal limitations period for claims of fraudulent transfer.

* * * *

The petition presents an important and recurring issue on which there is an acknowledged conflict among the federal courts. This case directly poses that issue in a context that is

outcome determinative and was preserved below. Accordingly, the Court should grant the petition and resolve the conflict among the circuits.

CONCLUSION

For the reasons stated herein and in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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